Langkawi R & D Academy Sdn Bhd v Ketua Setiausaha, Kementerian Pertahanan Malaysia & Ors

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01–467 OF 2010
ABDUL MALIK ISHAK, RAMLY ALIAND APANDI ALI JJCA
10 MARCH 2012

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Contract — Contingent contract — Non-fulfilment of condition precedent — Appellant undertook to refurbish upgrade and deliver fighter aircraft by specific date to obtain future contract — Appellant failed to deliver aircraft by specified date — Whether failure to fulfil condition precedent entitled respondents to terminate contract — Appellant consented to mode of trial adopted by trial court to determine suit — Whether appellant estopped on appeal from objecting to trial court's mode of trial

D

The appellant agreed in a contract with the Malaysian government ('the third respondent') to refurbish and upgrade the avionics of a F-5 fighter aircraft and have it delivered back to the third respondent as a Flyable Technology Demonstrator ('the demonstrator') by a specified date. This was to be the condition precedent for the grant of a future contract to the appellant to carry out similar work on nine more units of such aircraft. The appellant, however, not only failed to provide a performance bond as was required under the contract but failed to deliver up the demonstrator by the specified date which resulted in the contract being terminated. The appellant sued the defendants, inter alia, for damages for unilateral and invalid termination of the contract, damages for loss of future contract and exemplary damages. The High Court dismissed the claim. The suit was determined purely on the basis of written submissions filed by both parties without the calling of witnesses. This was because on the trial date, the trial judge and counsel for both parties examined the pleadings in detail to determine the issues for trial and at the end of the exercise the parties agreed there were no issues that required a trial with witnesses and that the matter could be determined based on written submissions. However, in its appeal to the Court of Appeal against the dismissal of its claim, the appellant objected to the mode adopted by the trial judge in determining the case and submitted that the non-calling of witnesses had deprived it of a fair trial.

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Held, dismissing the appeal with costs and affirming the decision of the High Court:

(1) Counsel from both sides had willingly consented to the mode of trial proposed by the trial judge. It was unfair of the appellant to now argue

that the mode of trial was imposed upon them. The notes of proceedings showed counsel from both sides did not object to the process of analysing of the pleadings by the trial judge before he decided that the mode of trial was to be by way of written submissions. The appellant was estopped from resiling from what it had agreed and consented to (see paras 17–19).

(2) The trial judge did not err in fact or in law in dismissing the appellant's claim. It was mandatory for the appellant to deliver to the government one unit of the Flyable Technology Demonstrator on or before 15 November 2011 and this was not done. It was also a condition precedent for the Demonstrator to have been delivered on or before that date before the future contract in respect of the nine units of F-5 fighter aircraft could be activated (see para 36).

(3) The appellant's failure to provide the performance bond within 14 days from the date of the contract and its failure to deliver the Flyable Technology Demonstrator on or before the specified date entitled the respondents to terminate the contract and consider themselves discharged therefrom (see paras 37 & 45).

[Bahasa Malaysia summary

Perayu bersetuju dalam kontrak dengan Kerajaan Malaysia ('responden ketiga') untuk membaik pulih dan menaik taraf avionik pesawat pejuang F-5 dan menghantar ianya balik kepada responden ketiga sebagai 'Flyable Technology Demonstrator' ('penunjuk cara') pada suatu tarikh yang dinyatakan. Ini menjadi syarat duluan untuk pemberian kontrak masa hadapan kepada perayu untuk menjalankan kerja yang sama ke atas sembilan lagi unit pesawat sedemikian. Perayu, walau bagaimanapun bukan sahaja gagal untuk memperuntukkan bon prestasi seperti yang dikehendaki di bawah kontrak tersebut tetapi gagal untuk menghantar penunjuk cara tersebut pada suatu tarikh yang dinyatakan yang mana mengakibatkan kontrak tersebut ditamatkan. Perayu menyaman defendan-defendan, antara lain, untuk ganti rugi bagi penamatan unilateral dan tak sah kontrak, ganti rugi untuk kehilangan kontrak masa hadapan dan ganti rugi teladan. Mahkamah Tinggi menolak tuntutan tersebut. Tindakan tersebut ditentukan semata-mata atas dasar hujahan-hujahan bertulis yang difailkan oleh kedua-dua pihak tanpa memanggil saksi-saksi. Ini adalah kerana pada tarikh perbicaraan, hakim perbicaraan dan peguam untuk kedua-dua pihak memeriksa pliding secara terperinci untuk menentukan isu-isu untuk perbicaraan dan pada akhir pemeriksaan tersebut pihak-pihak bersetuju tidak terdapat isu-isu yang memerlukan perbicaraan dengan saksi-saksi dan bahawa perkara tersebut boleh ditentukan berdasarkan hujahan-hujahan bertulis. Walau bagaimanapun, dalam rayuannya kepada Mahkamah Rayuan terhadap penolakan tuntutannya, perayu membantah kepada cara yang digunakan oleh hakim perbicaraan dalam menentukan kes tersebut dan berhujah bahawa

dengan tidak memanggil saksi-saksi telah menafikannya kepada perbicaraan adil.

Diputuskan, menolak rayuan dengan kos dan mengesahkan keputusan Mahkamah Tinggi:

(1) Peguam daripada kedua-dua pihak telah dengan rela bersetuju kepada cara perbicaraan yang dicadangkan oleh hakim perbicaraan. Adalah tidak adil jika perayu sekarang menegaskan bahawa cara perbicaraan dikenakan ke atas mereka. Nota prosiding menunjukkan peguam daripada kedua-dua pihak tidak membantah kepada proses menganalisa pliding oleh hakim perbicaraan sebelum beliau memutuskan bahawa cara perbicaraan adalah melalui hujahan-hujahan bertulis. Perayu diestop daripada mengambil tindakan daripada apa yang dipersetujuinya dan yang diizinkan (lihat perenggan 17–19).

(2) Hakim perbicaraan tidak tersilap dari segi fakta atau undang-undang dalam menolak tuntutan perayu. Ia adalah mandatori bagi perayu untuk menghantar kepada kerajaan satu unit 'Flyable Technology Demonstrator' pada atau sebelum 15 November 2011 dan ini tidak dilakukan. Ia juga adalah syarat duluan untuk penunjuk cara dihantar pada atau sebelum tarikh tersebut sebelum kontrak masa hadapan berkaitan sembilan unit pesawat pejuang F-5 dapat diaktifkan (lihat perenggan 36).

(3) Kegagalan perayu untuk memperuntukkan bon prestasi dalam masa 14 hari daripada tarikh kontrak dan kegagalannya untuk menghantar 'Flyable Technology Demonstrator' pada atau sebelum suatu tarikh yang dinyatakan memberikan hak kepada responden-responden untuk menamatkan kontrak dan menganggap diri mereka dilepaskan daripadanya (lihat perenggan 37 & 45).]

Notes

For a case on non-fulfilment of condition precedent, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) para 3802.

Cases referred to

Abdul Razak bin Datuk Abu Samah v Shah Alam Properties Sdn Bhd and another appeal [1999] 2 MLJ 500, CA (refd)

Aberfoyle Plantations Ltd v Khaw Bian Cheng [1960] AC 115, PC (refd)

Board of Trustees of the National Provident Fund v Shortland Securities Ltd [1996] 1 NZLR 45, CA (refd)

Charles Robert Leader and Henrietta Ada Leader v George F Duffey and Amyatt Edmond Ray (1888) 13 App Cas 294 (refd)

Chase Perdana Bhd v Md Afendi bin Hamdan [2009] 6 MLJ 783; [2009] 6 CLJ 501, FC (refd)

Dato' Abul Hasan Mohamed Rashid v Multi-Code Electronics Industries & Anor [2012] 5 MLJ 176; [2012] 2 MLRA 613, CA (refd)
Federal Insurance Co v Nakano Singapore (Pte) Ltd [1992] 1 SLR 390, CA (refd)
Head v Tattersall [1871] LR 7 Exch 7, SC (refd)
Krishnan Rajan a/l N Krishnan v Bank Negara Malaysia & Ors [2003] 1 MLJ 149, HC (refd)
M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor [1994] 1 MLJ 294; [1994] 2 CLJ 14, SC (refd)
National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd [1983] 2 MLJ 211; [1983] CLJ (Rep) 282, FC (refd)
Progressive Insurance Bhd v Pile Force Sdn Bhd & Ors [2005] MLJU 375; [2005] 8 CLJ 559, HC (refd)
Tan Chong & Sons Motor Company (Sdn) Bhd v Alan McKnight [1983] 1 MLJ 220, FC (refd)
Toll (FGCT) Pty Limited v Alphapharm Pty Limited and Others (2004) 219 CLR 165, HC (refd)
Trans Trust SPRL v Danubian Trading Co Ltd [1952] 2 QB 297, CA (refd)
Visia Finance Bhd v Expert Credit & Leasing Sdn Bhd & Ors [1998] 2 MLJ 705; [1998] 2 CLJ 845, CA (refd)

Legislation referred to

Rules of the High Court 1980 O 33 rr 2, 3, 3(1), O 34

Appeal from: Civil Suit No S1–212–17 of 2005 (High Court, Kuala Lumpur)

M Manogar (Manogar & Co) for the plaintiff/appellant.
Nik Mohd Noor bin Nik Kar (Nurhafizza bt Azizan with him) (Senior Federal Counsel, Attorney General's Chambers) for the respondents.

Abdul Malik Ishak JCA (delivering judgment of the court):

[1] This is the judgment of this court.

[2] The memorandum of appeal filed by plaintiff appellant questioned the mode adopted by the learned High Court judge in disposing off the case by not calling any witnesses and this was said to have prejudiced the plaintiff appellant of a fair trial. The hearing of the case was set for three days beginning from 6 April 2010–8 April 2010. But on the first day of the trial, and that would be on 6 April 2010, the learned High Court judge conducted a case management and instructed counsel on both sides to examine and analyse the pleadings paragraph by paragraph in order to determine the issues to be tried.

[3] On 6 April 2010, three options were given by the learned High Court judge to counsel on both sides to select after perusing through the paragraphs

of the pleadings whether to determine the issues by way of a trial or by way of written submissions or decide that the paragraphs in the pleadings constituted non-issues. The three options can be seen in the notes of proceedings dated 6 April 2010 at pp 97–98 of the appeal record at *jilid* 2, *bahagian* 'B' and they may be stated as follows:

(i) 'X' refers to a non-issue; or

(ii) 'T' refers to a trial where witnesses will be called; or

(iii) 'S' refers to a submission.

[4] The appeal record for the session on 6 April 2010 at *jilid* 2, bahagian 'B' is self explanatory. It shows that the learned High Court judge had given ample opportunities to counsel on both sides to decide and determine the options accorded to them. The learned High Court judge went through a meticulous process of examining every paragraph in the pleadings with active participation of counsel on both sides in order to ensure that all the paragraphs were read before the options were exercised.

[5] After completing the rigmarole of analysing the pleadings, the plaintiff appellant and the defendants respondents agreed that there were no paragraphs in the pleadings that needed to be determined by way of a trial. In fact, the parties agreed as follows:

(i) that paragraphs 3, 6, 7,12 to 24, 26 to 34, 36 to 46 and 49 to 52 in the Statement of Claim were issues that should be determined by the learned High Court Judge by way of submissions; and

(ii) that the rest of the paragraphs in the Statement of Claim were not in dispute.

[6] It must be emphasised that after the pleadings were vigorously analysed, the plaintiff appellant did not at any time state that they did not agree to the resolutions arrived at by the learned High Court judge. Indeed both parties were co-operative and they agreed, upon directions by the learned High Court judge, to file in their written submissions based on the documents agreed to by both parties.

[7] The exchanges between counsel on both sides with the learned High Court judge as seen at pp 122–123 of the appeal record at *jilid* 2, *bahagian* 'B' are now reproduced and they show the cooperation accorded to the learned High Court judge:

Mandagar: I'm wondering, My Lord, I don't see a T here. (Laughter from the Court).

Noraniza Ali: Exactly.

Manogar: So what happens to this?

Judge: That's right. That's why I asked the question, whose bright idea was to ask for 3 days?

Manogar: I remain guided by — I suppose we remain guided by the 3 circles. What happens next?

Judge: Alright, so we don't have a 'T', so we only have 'S' — right?

Manogar: Yes, My Lord.

Norahisa: Yes, Yang Arif.

[8] And at p 127 of the appeal record at *jilid* 2, *bahagian* 'B', the transcript shows the following exchange:

Manogar: Another point, My Lord, just wish to clarify. The witness statements filed has been marked. So would it be part of the — what happens to those — just to ignore them?

Judge: Ya, they have to be ignored. They were completely unnecessary — right?

Manogar: OK.

[9] Mr Manogar was very accomodating and pleasant towards the learned High Court judge. But before us, he submitted that 'never at any time during the unwarranted analysis of pleadings done on the morning of 6th April 2010 did counsel for the appellant agree that there is no need for witnesses to be heard' (see the written submission of the plaintiff appellant's solicitor at pp 2–3).

[10] It is germane, at this juncture, to refer to O 33 r 2 of the Rules of the High Court 1980 ('RHC'). It reads as follows:

2 Time, etc, of trial of questions or issues (O 33 r 2)

The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.

[11] Chan Sek Keong J (now Chief Justice of Singapore) in *Federal Insurance Co v Nakano Singapore (Pte) Ltd* [1992] 1 SLR 390, at p 397, speaking for the Court of Appeal of Singapore aptly said:

… we may state as a general rule that the court will not exercise its power under O 33 r 2 to order a preliminary point of law to be tried, whether or not that point involves the prior determination of factual disputes affecting that point, unless the

trial of that issue will result in a substantial saving of time and expenditure in respect of the trial of the action as a whole (including any counterclaim). A

[12] Abdul Malik bin Ishak J (now JCA) in *Krishnan Rajan a/l N Krishnan v Bank Negara Malaysia & Ors* [2003] 1 MLJ 149, at p 154, interpreted O 33 r 2 of the RHC in these salient words: B

> The principles of law that can be distilled from the long line of established authorities may conveniently be marshalled in these terms:
>
> (i) that the rule confers upon the court a wide discretionary power to order any question or issue in a cause or matter, whether of fact or law or partly of fact and partly of law, to be tried before, at or after the trial of the cause or matter; C
>
> (ii) that the application under O 33 r 2 of the RHC may not be appropriate where the facts are in dispute or where extrinsic evidence is required to be adduced; D
>
> (iii) that the overriding consideration, when taken in its correct perspective, is whether the application would result in a substantial saving of time and expenditure; and
>
> (iv) that the court should be wary and warn itself against the abuse of this process. E

[13] It is patently clear that O 33 r 2 of the RHC is designed to save unnecessary costs and time in situations where it would be appropriate to resolve an issue in a cause or matter as a preliminary issue for the simple reason that its determination is likely to have the effect of substantially disposing off the cause or matter. Here, the learned High Court judge in deciding the cause or matter gave directions that the parties filed written submissions instead of calling witnesses to testify after His Lordship conducted an intensive paragraph by paragraph analysis of the pleadings with the participation of counsel from both sides. It is an unfettered exercise of discretion by the learned High Court judge and we see nothing wrong with such an approach. F G

[14] It is also ideal to refer to O 33 r 3 of the RHC. It is worded as follows: H

> 3 Determining the mode of trial (O 33 r 3)
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> (1) In every action begun by writ, an order made on the summons for directions shall determine the mode of the trial; and any such order may be varied by a subsequent order of the Court made at or before the trial. I
>
> (2) In any such action different questions or issues may be ordered to be tried by different modes of trial and one or more questions or issues may be ordered to be tried before the others.
>
> (3) The references in this Order to the summons for directions include

references to any summons or application to which, under any of these rules, Order 25 rules 2 to 7 are to apply, with or without modifications."

[15] Now, O 33 r 3(1) of the RHC stipulates for the mode of the trial to be determined by the trial court. Here, the mode of the trial by way of written submissions was determined by the learned High Court judge with the concurrence of counsel from both sides. To put it in another way, both the parties had willingly consented to the mode of the trial proposed by the learned High Court judge. It is certainly unfair for the plaintiff appellant to argue before us that the mode of the trial was imposed upon them. The notes of proceedings for the session on the 6 April 2010, as reflected at pp 90–128 of the appeal record at *jilid* 2, *bahagian* 'B' bear testimony to the fact that counsel from both sides did not object to the process of analysing all the paragraphs in the pleadings by the learned High Court judge before His Lordship decided the mode of the trial for the case by way of written submissions. It is too late in the day for learned counsel for the plaintiff appellant to complain before us now.

[16] Order 34 of the RHC envisages the need for speedy disposal of the case. And this is equally applicable to this appeal. Abdul Malik bin Ishak JCA in *Dato' Abul Hasan Mohamed Rashid v Multi-Code Electronics Industries (M) Berhad & Anor* [2012] 5 MLJ 176 at p 184; [2012] 2 MLRA 613,, at p 618 aptly said:

> (20) We would like to make an observation that O 34 of the RHC calls for not only the expeditious and economical despatch of the case, it also calls for the just disposal of the suit.

[17] The learned High Court judge had also ordered both parties to submit their written submissions after His Lordship was satisfied that both parties consented to the mode of the trial as proposed by His Lordship. Pursuant to His Lordship's directions, on 30 April 2010, the defendants respondents filed their written submissions. On 24 June 2010, the plaintiff appellant also filed its written submission. By way of a response, on 2 July 2010, the defendants respondents filed their submissions in reply.

[18] It is apparent from the recital of the chronology of events, both parties agreed to the mode of the trial proposed by the learned High Court judge. At this appellate stage, it is not open to the plaintiff appellant to complain. Such a complaint is tantamount to defying the order of the learned High Court judge. In this context, it is ideal to refer to the case of *Visia Finance Bhd v Expert Credit & Leasing Sdn Bhd & Ors* [1998] 2 MLJ 705; [1998] 2 CLJ 845, a decision of this court. Mahadev Shanker JCA (as he then was) speaking for this court, in that case, had this to say at p 712 (MLJ); p 854 (CLJ) of the report:

> Here both counsel had consented to proceed in a particular way. An order made by consent in the absence of fraud, can only be varied by consent. It would be a denial of justice to permit a party to resile from what his counsel decided for him merely because he lost.

[19] Likewise here, the plaintiff appellant lost before the High Court and they are now resiling from what they had agreed and consented to.

[20] Another case in point would be that of *Progressive Insurance Bhd v Pile Force Sdn Bhd & Ors* [2005] MLJU 575; [2005] 8 CLJ 559, a decision of Vincent Ng J (later JCA). In that case, the parties disclosed to the court that they have agreed to appoint a private handwriting expert. And they made known to the court that they agreed to be bound by the result of the examination conducted by a private handwriting expert and resolve the suit with finality. The agreement was that, if the expert report was in the second and fourth defendants' favour, the plaintiff's claim would be dismissed and the second defendant's counterclaim would be allowed. But, if the expert report was in the plaintiff's favour, then the plaintiff's claim ought to be allowed and the said counterclaim would be dismissed. Thus, an order by consent of all the parties were entered and the documents were then returned to the parties for further action. On the case management date of 25 November 2004, the court was informed that the appointed handwriting expert had prepared his report. The expert certified that the handwriting on the documents were genuine and true signature of the fourth defendant. Based on the parties prior agreement on the mode of case disposal, Vincent Ng J (later JCA) entered judgment for the plaintiff as prayed in prayers (a)–(c) of encl one (1) and dismissed the second defendant's counterclaim. Aggrieved, the second defendant filed an appeal to the Court of Appeal. The second defendant also filed a summons in chambers in encl 91, inter alia, to set aside and to stay execution of Vincent Ng J's (later JCA's) judgment. At p 564 of the report, Vincent Ng J (later JCA) had this to say:

> Thus, after considering my recorded notes and all the facts and circumstances which led to the said consent order, it is very clear that the second defendant was minded to raise the issue that he was not to be bound by the consent order only after the parties had secured the finding of the private handwriting expert which was not in his favour. This conduct on the part of the second defendant is wholly unbecoming and reprehensible as, had the private handwriting expert's finding been adverse to the plaintiffs case, I am sure the second defendant would have been happy to be bound by the finding and insist that the plaintiff's claim be dismissed with costs and judgment be entered on his counterclaim.

[21] In regard to the letter written by the plaintiff appellant's counsel dated 12 May 2010 addressed to the registrar, High Court, Kuala Lumpur and to the secretary to the judge, High Court Civil 6, Kuala Lumpur and copied to the

senior federal counsel, Puan Noramilia, of the attorney general's chambers as well as to the plaintiff appellant expressing dissatisfaction that the mode of the trial was to be conducted by way of written submissions of both parties, we have this to say. With respect, the letter dated 12 May 2010 was written one month and six days after the learned High Court judge had managed the case and gave directions on 6 April 2010 to both parties. If learned counsel for the plaintiff appellant insisted that witnesses should be called for the trial, it should be reflected in the notes of proceedings recorded on 6 April 2010. But this was not so. Having consented to dispose off the case by way of written submissions, learned counsel for the plaintiff appellant is estopped from resiling.

[22] Once again, we will reproduce segments of the notes of proceedings for the session dated 6 April 2010 as seen at pp 119–121 of the appeal record at *jilid* 2, *bahagian* 'B' that will support the assertions that the plaintiff appellant's counsel agreed to the mode of tendering written submissions to dispose off the whole case. For starters, we will refer to p 119, it reads as follows:

Manogar: For the Plaintiff, My Lord, it's enough to show that the Defendant admits receiving the letter dated 1.7.2005.

Judge: So you will then just leave it to submissions now?

Manogar: Yes. Yes. We just want to establish the letter was sent and received.

Judge: Alright.

Manogar: So we'll submit.

Judge: Alright, and Federal Counsel?

Noramilia: Yes, Yang Arif.

Judge So we just put an 'S' in the circle. 47, 48 and 49 — to be honest when I read them and right now also I don't know what to make of it.

Manogar: No issue, My Lord, nothing to submit also on that.

Judge: That's right.

Noramilia: 'X'.

Manogar: 'X'.

[23] Next, we refer to pp 120–121. They read as follows:

Judge: Also claim damages for this 432 million?

Manogar: Yes. because the contract mentions that after the first aircraft job is done then the contract allows for another 9 aircrafts — a future contract it costs 22.

Judge: Alright, so that's your basis for this amount-alright.

Manogar: That's the amount (of our) basis, yes.

Judge: So then it is a matter of submissions — right?

Norainsia: Yes.

Manogaran: Yes.

Judge: And Federal Counsel, you agree it's a matter of submissions. Alright, circle with an 'S'. Paragraph 51.

Manogaran: Paragraph 51, My Lord, it's more on submission of the law.

Judge: It's all submissions, isn't it?

Manogaran: Yes, whether they are entitled to.

[24] In regard to the merits of the case, we will now set out the brief facts in this way. On 11 October 2001, the plaintiff appellant entered into a contract with the Government of Malaysia wherein the Government of Malaysia agrees to provide one unit RMAF F-5 fighter aircraft to the plaintiff appellant and the latter agrees to carry out the avionics upgrade and refurbishment of the said aircraft as a flyable technology demonstrator in accordance with the contract vide KP/PERO-3/U/A/4/2001. The flyable technology demonstrator was to be delivered to the Government of Malaysia on or before 15 November 2001. The plaintiff appellant agreed to upgrade and refurbish the said aircraft without being paid and upon the plaintiff appellant's successful delivery of the flyable technology demonstrator, the plaintiff appellant was entitled to ten years future contract.

[25] Prior to the contract, there was a letter of acceptance signed by both parties dated 12 July 2001 and this letter of acceptance stipulated that the plaintiff appellant was obliged to deliver the flyable technology demonstrator during the LIMA 2001 show held in Langkawi. But the plaintiff appellant failed to deliver the flyable technology demonstrator on the scheduled date.

[26] The plaintiff appellant used the expertise of Caledonian Airborne Systems Limited ('Cas Ltd') a company incorporated in Scotland, to assist the plaintiff appellant to carry out avionics upgrade works on the said aircraft and this is within the knowledge of all the defendants respondents and it is also in compliance with cl 19 of the contract. To foster relationship with Cas Ltd, the plaintiff appellant signed a subcontract with Cas Ltd. However, on 7 February 2002, the plaintiff appellant informed the defendants respondents that the plaintiff appellant had terminated its subcontract with Cas Ltd.

[27] During the commencement of the contract, the plaintiff appellant was allowed access into TUDM Butterworth premises to carry out the upgrading works on the said aircraft. But when the defendants respondents awarded the said works to Cas Ltd, the plaintiff appellant was prohibited from entering the TUDM Butterworth premises.

[28] The first defendant respondent terminated the contract on 26 August 2002 (see pp 472–473 of the appeal record at *jilid* 2, *bahagian* 'C') and on 6 September 2002 (see pp 384–385 of the appeal record at *jilid* 2, *bahagian* 'C') on the grounds that the plaintiff appellant failed to deliver the performance bond and also failed to the deliver flyable technology demonstrator on or before 15 November 2001.

[29] The plaintiff appellant claimed damages for the unilateral termination of the contract based on the interpretation of several clauses set out in the contract itself. The English language translation of the statement of claim itemised the claims of the plaintiff appellant in this fashion:

> 49. The plaintiff here claims damages as a result of the unilateral and invalid termination of the said contract for a sum of RM48 million.
>
> 50. The plaintiff also claims damages for RM432 million for loss of future contract as per clause 22 of the said contract.
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> 51. The plaintiff also claims exemplary damages from the third defendant due to the oppressive conduct of the first and second defendants.
>
> 52. The plaintiff also prays for interest and costs of this action. Wherefore the plaintiff prays for judgment as follows:
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> (a) RM48 million as damages;
>
> (b) RM432 million as damages and future loss of contract;
>
> (c) exemplary damages;
>
> (d) interest on the total judgment sum at 8% per annum from 1.7.2005 until full settlement;
>
> (e) costs of this action; and
>
> (f) other necessary and ancillary orders as relief deemed fit and appropriate by this Honourable Court.

[30] The termination letters dated 26 August 2002 and 6 September 2002 reflected the defence relied upon by the defendants respondents, namely:

(a) failed to provide the performance bond within 14 days from the date of the contract as provided for in cl 5.1 of the contract; and

(b) failed to deliver one unit flyable technology demonstrator before 15 November 2001 as provided for in cl 7.3.2 of the contract.

[31] The learned High Court judge did not err in fact and in law in dismissing the plaintiff appellant's claim. His Lordship examined the clauses in the contract and arrived at a just decision. Clause 7.3 and cl 7.3.2 of the contract must be read together. It stipulates that the plaintiff appellant shall deliver to the government one unit of flyable technology demonstrator on or

before 15 November 2001. This is the intention of the parties and the learned High Court judge has given, effect to it. It is often said that the 'intention of the parties' reflects the true meaning of the contract. In *Toll (FGCT) Pty Limited v Alphapharm Pty Limited and Others* (2004) 219 CLR 165, the High Court of Australia held that (see p 179):

> References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction (*Pacific Carriers Ltd v BNP Paribas* [2004] 218 CLR 451 at pp 461–462).

[32] The New Zealand Court of Appeal in *Board of Trustees of the National Provident Fund v Shortland Securities Ltd* [1996] 1 NZLR 45 (CA) aptly said at p 50:

> The parties, particularly knowledgeable and experienced parties, legally advised, are to be taken to have intended what they have said.

[33] The meaning of the contract between the parties must be ascertained from the language the parties have used, and particular attention must be paid to the commercial purpose of the contract. Lord Halsbury LC in *Charles Robert Leader and Henrietta Ada Leader v George F Duffey and Amyatt Edmond Ray* [1888] 13 App Cas 294 succinctly said at p 301:

> But I agree that you must look at the whole instrument, and, inasmuch as there may be inaccuracy and inconsistency, you must, if you can, ascertain what is the meaning of the instrument taken as a whole in order to give effect, if it be possible to do so, to the intention of the framer of it.

[34] The learned High Court judge did just that when His Lordship said in his written grounds of judgment at pp 36–39 of the appeal record that:

> (29) The terms are mandatory. Since it is not the Plaintiff's pleaded case that a Flyable Technology Demonstrator was in fact completed by 15.11.2001, there was on the face of it a breach of Clause 7.3.2 by the Plaintiff.
>
> (30) The relevant question that arises is whether the breach is material?
>
> (31) It is observed that the delivery of the Flyable Technology Demonstrator was both a condition for payment under Clause 4.2 as well as a pre-condition before entering into a contract for nine further units between 15.6.01 until 14.6.11. Indeed the opening statement for the Plaintiff said:

> 'The said agreement is for the Plaintiff to prepare one unit of a Technology Demonstrator for the Defendants and thereafter the Plaintiff and the Defendants would enter into an agreement for another 9 units F5-F aircraft. The future contract is dependent upon the willingness of the Plaintiff delivering one Technology Demonstrator aircraft under the said agreement. There are no other conditions for the future contract in respect of the 9 units F5-F aircraft.'

(32) Clause 4 as to scope of contract between the parties requires the Plaintiff to upgrade the aircraft in accordance with OEM standard on system/component listed in Schedule 1, ground and air functional tests in accordance with OEM test protocol and certification of the aircraft prior to it being flight tested by RMAF pilot. The terms 'upgrade' and 'aircraft' in the clause were specifically defined in Clause 1. In particular, 'upgrade' was defined as 'Means the designing of a new/better aircraft related system as compared to current system, manufacturing and/or fabrication of the designed system, bench and system integration test, removal of the existing system, installation and integration of the new system to the AIRCRAFT, ground and air functional test of the system in accordance with the original equipment and/or aircraft manufacturer (OEM) test protocol.

(33) Clause 4.2 upon which the Plaintiff relies for its claim of RM48 million damages provides:

> 4.2 After successful completion of the avionics upgrade and refurbishment of the technology demonstrator and subject to the acceptance by the GOVERNMENT, a monthly payment of the AIRCRAFT to a value of not more than Ringgit Malaysia Four Hundred Thousand (RM400,000.00) only being proportionate of Ringgit Malaysia Twenty Thousand (RM20,000.00) per hour and a maximum of twenty (20) hours per month be paid by the GOVERNMENT to the Company for a maximum period often (10) years.

(34) On the face of it, the scope of contract is extensive and payment commences after successful completion of the avionics upgrade and refurbishment of the Technology Demonstrator. Even so, and although the agreement was signed on 11.10.2001, it carried as a condition the delivery of the Technology Demonstrator by 15.11.2001. Given that the parties are no novices, the condition can only be a term of the contract that is (a) uppermost in the minds of the Defendants as a condition, and (b) representation by the Plaintiff as their commitment and ability to demonstrate their capability and technical expertise.

[35] Continuing at p 40 of the appeal record, the learned High Court judge had this to say in his written grounds of judgment:

(37) Hence, not only was there a material breach of the contract between the parties in respect of the agreement relating to the Technology Demonstrator and warranting its termination, but also there was breach of the pre-condition to entering into contracts for further nine aire rafts. After the breach, there remained no valid obligation to enter into any contract for the further nine aircrafts.

[36] It is mandatory on the part of the plaintiff appellant to deliver to the Government oneunit of flyable technology demonstrator on or before 15 November 2001 and this was not done. To compound the matter further, the opening statement of the plaintiff appellant as alluded to by the learned High Court judge makes it a condition precedent to deliver one unit of flyable technology demonstrator on or before the scheduled date before the future contract in respect of the nine units of RMAF F-5 fighter aircrafts is activated.

[37] The term of the contract has been breached when the plaintiff appellant failed to deliver one unit of flyable technology demonstrator on or before 15 November 2001 to the government and such failure gives the innocent parties — the defendant respondents herein, the right to repudiate the contract and consider themselves discharged therefrom and could even claim damages for the breach (*Tan Chong & Sons Motor Company (Sdn) Bhd v Alan McKnight* [1983] 1 MLJ 220 (FC); and *Abdul Razak bin Datuk Abu Samah v Shah Alam Properties Sdn Bhd and another appeal* [1999] 2 MLJ 500 (CA)).

[38] It cannot be denied that the term that has been flouted is fundamental to the contract and the innocent parties are entitled, under the law, to treat themselves as being discharged and sue for damages. This is the law and this is the scenario in this appeal before us.

[39] On conditions precedent, the learned High Court judge referred to the following authorities:

(a) *Aberfoyle Plantations Ltd v Khaw Bian Cheng* [1960] AC 115 (PC);

(b) *National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211; [1983] CLJ (Rep) 282 (FC);

(c) *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294; [1994] 2 CLJ 14, 56 (SC); and

(d) *Chase Perdana Bhd v Md Afendi bin Hamdan* [2009] 6 MLJ 783; [2009] 6 CLJ 501 (FC).

[40] A contract is subject to a condition precedent when the contract is not binding unless or until a specified event occurs. Thus, where the condition is precedent, the agreement is not fully binding until the event occurs. The

non-fulfilment of a condition precedent will result in the contract being discharged, either automatically or at the election of one of the parties.

[41] Delivering one unit of flyable technology demonstrator on or before the scheduled date is a condition precedent which must be fulfilled before any contract is concluded at all. And it was not fulfilled.

[42] Two authorities will now be referred to. The first is the case of *Head v Tattersall* (1871) LR 7 Exch 7. That was a case where a horse was sold on the basis that it had been hunted with the bicester hounds. It was expressly stated by the seller that if it had not been so hunted the buyer could return it by 5pm on the following Wednesday. Before that time arrived, the horse was injured and the buyer discovered that it had not been hunted with the bicester hounds. The buyer had not been at fault with regard to the injury to the horse. It was held that the buyer could return the horse, despite its injury, because it had not been hunted with the bicester hounds.

[43] The second is the case of *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 QB 297, 304 (CA). That case concerned a contract for the sale of one thousand tons of rolled steel. There was an obligation on the buyer to open a confirmed letter of credit to pay for the steel. It was necessary that the buyer should open the letter of credit before the seller became liable to deliver. It was known to both parties that the seller could not obtain the goods until the letter of credit was opened. The obligation to open the letter of credit was construed as a condition precedent to the seller's obligation to deliver. And it was held that the seller did not have to perform until the buyer had done so.

[44] In regard to the performance bond, at p 42 of the appeal record, the learned High Court judge had this to say in his written grounds of judgment:

> (39) Similarly, it was not pleaded that any such performance bond had been delivered at any time. As the obligation was to maintain it at 5% at all times, topping it up in the event of any claims, it is an important obligation. The Plaintiff was, therefore, in breach of cl 5.1, and breach of it is not inconsequential when the nature of the breach is in not submitting any performance bond at all.

[45] The failure on the part of the plaintiff appellant to provide the performance bond within 14 days from the date of the contract must necessarily fall on 25 October 2001 — calculated from 11 October 2001 being the date of signing of the contract. Whereas the breach as to the delivery of one unit of flyable technology demonstrator occurred on 15 November 2001. These breaches entitled the defendants respondents to terminate the contract and to prevent the plaintiff appellant access to the TUDM Butterworth premises.

[46] For these reasons, we unanimously dismissed the appeal of the plaintiff appellant with costs of RM15,000. We affirmed the decision of the learned High Court judge. Deposit should rightly go to the defendants respondents.

Appeal dismissed with costs and affirming the decision of the High Court.

Reported by Ashok Kumar